*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: June 30, 2003

TO : Richard L. Ahearn, Regional Director
Catherine M. Roth, Regional Attorney
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Region 19

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Gary Noren Productions 177-1650-0100
Case 19-CA-28312 512-5030-2050
554-1401-5000

This case was submitted for advice on whether two entities were joint employers and, if so, whether one is liable for the three alleged unfair labor practices committed by the other: failing to apply a collective bargaining agreement; interrogating job applicants; and soliciting a Union member to withdraw membership. We conclude that the parties are joint employers and that both parties are liable for failing to apply the contract and soliciting the Union member to withdraw membership. Neither party, however, is liable for the alleged interrogation because, under the specific facts of this case, it was not coercive to ask applicants for employment about their union status.

## FACTS

Gary Noren Productions (Noren) is a small production company based in Seattle that produces television commercials. Gary Noren serves as president and director, and June Leahy, Noren's wife, is the executive producer. Noren is a signatory to the 2001-2003 Screen Actors Guild (SAG or Union) collective-bargaining agreement (the Code).

June Leahy is also the sole proprietor of Leahy Productions, a small production company that is not a Union signatory. Noren and Leahy run their production companies out of their home, work for each other's companies, and share workspace.[1]

Nelson-Henry Inc. (NH) provides advertising services, including the production of commercials, to CNS, Inc., the manufacturer of Breathe Right products. In early 2002, CNS contracted with NH to produce a commercial for a new Breathe Right product.

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[1] Based on this evidence, the Region has determined that Leahy Productions and Noren are a single employer.

In August 2002, NH's producer, Becky Conlon, solicited a bid from Noren to provide the film production services for the Breathe Right commercial. Conlon had worked with Noren in the past and was aware that Noren was a Union signatory. Conlon also knew that Leahy Productions was not a Union signatory. Conlon never clarified whether she was hiring Noren's production company or Leahy's. It appears that Conlon contemplated using Noren's company if union actors were chosen and Leahy's company if nonunion actors were chosen.

Conlon stated that small advertising agencies like NH, which is not a SAG signatory, routinely cast union and nonunion. If even one of the actors chosen is union, it becomes a union shoot, and NH normally uses a payroll or sound production company that is a union-signatory to pay the actors. If all actors are nonunion, NH hires the actors directly and pays a flat, buy-out fee.

Noren and NH signed a contract on August 20, 2002. The contract contained a clause holding Noren responsible for abiding by any applicable requirements of any union agreement.

Meanwhile, Leahy secured the services of a local casting director, Steve Salamunovich, to cast the commercial. Leahy instructed Salamunovich to cast the commercial for union and nonunion talent. With a union casting call, talent agents will send union and nonunion talent so long as the actors meet the "professional" actor preference criteria in the Code. Agents do not send actors who are SAG members to nonunion calls as SAG members may be fined for doing nonunion work. The SAG Code provides for residual payments to actors, compensating them for the length of time a commercial airs and its geographic location. Because of the residual payments, SAG commercials are normally far more lucrative than nonunion commercials.

Salamunovich picked several actors to attend an audition held on August 21. At the audition, the actors signed a SAG sign-in sheet and filled out casting questionnaires. One of the questions asked whether the actor was a member of SAG or other unions. Other questions asked, if not a union member, whether the applicant had ever received a non-union waiver to work a union job and whether the applicant was willing to join a union to work the job. Four actors testified that Seattle casting directors routinely use similar forms to question applicants about union status during early stages of the auditioning process. The applicants were also required to provide resumes, which routinely and prominently list union affiliations.

One of the actors, Dan Farmer, marked his questionnaire ambiguously. On the question of union membership, Farmer checked outside of any boxes, but closer to the "other" box than the "SAG" box. Farmer also answered one of the questions posed only to nonunion members and submitted a resume that was ambiguous as to his SAG membership, stating, "SAG/AFTRA Eligible."

Salamunovich taped the August 21 audition and sent it to Noren and Conlon, along with a list indicating which of the actors were nonunion. Noren and several NH representatives reviewed the tape and chose candidates for callbacks. Noren and NH agreed that another round of auditions should be held for men with thicker necks. Leahy therefore asked Salamunovich to widen his search for talent.

Salamunovich again called the agents to ask for more talent, specifically focusing on nonunion talent since Leahy thought that they had seen most of the union talent. Salamunovich conducted another round of auditions and Noren and NH again reviewed the tapes.

On September 5, Noren and NH held callbacks to select the top three male and female candidates. Noren gave instructions to each pair of actors at the audition before they were filmed. Noren, Conlon, and a NH writer determined the six finalists and ranked them. The top two male candidates were both SAG members. Farmer, the third, was Union but NH and Noren believed at the time that he was nonunion based on the ambiguous notations on his casting questionnaire. The top female actress was nonunion.

Based on the list of finalists, Salamunovich called the actors' agents to request that the actors accept placement on right of first refusal, committing the actor to be available if selected. The commitment is taken very seriously in the business. Salamunovich called talent agent Swope, who represented all three top male candidates. When Swope expressed pleasure that the shoot would be Union, Salamunovich told Swope that he thought Farmer was "fi core." Swope indicated that she thought Farmer was SAG and offered to check on his status. Farmer, however, accepted first refusal before Salamunovich learned of his true union status.

Still believing Farmer to be nonunion, Conlon took a tape of the six finalists to a meeting with the client, CNS. Conlon played the tape at the meeting, attended by two other NH representatives and three high level CNS representatives. Everyone agreed that the top-ranked female actress was the best and, after some discussion, that Farmer was the best

male candidate. After the selection was made, Conlon told the group that it would be a nonunion shoot since both actors selected were nonunion. Cost was not an issue or even discussed in the meeting.

During a series of calls involving Leahy, Salamunovich, Swope, and Farmer, Leahy and Salamunovich learned that Farmer was in fact a SAG member. Leahy asked Salamunovich to see if Farmer was willing to become fi core. According to Swope, Salamunovich was very angry that Farmer had apparently lied on his questionnaire and told Swope that Farmer would have to resign his SAG membership and follow through on his commitment. Swope conveyed this message to Farmer. Farmer was hesitant because of the financial considerations but eventually agreed to resign his membership after negotiating more money. According to Farmer, he agreed to withdraw from SAG in order to help Swope smooth her relationship with Salamunovich, one of the few casting directors in Seattle. On September 6, Farmer wrote a letter to the Union indicating his desire to change his status to fi core.

During this period, Leahy informed NH's Conlon that Farmer had lied about his union status but was willing to go fi core. Conlon did not ask Leahy about the circumstances surrounding Farmer's offer to withdraw from the Union, nor did she offer to have a Union shoot under the SAG contract. The shoot therefore remained nonunion. When Farmer had demanded more money before resigning his Union membership, Leahy had also called Conlon, who authorized the increase.

Two days before the shoot, the actors went to Noren's house where they were fitted with wardrobe for the commercial. Noren and the NH writer decided on which clothes the actors would wear.

At the September 12 shoot of the commercial, Noren directed the actors during the five hours of filming. Although several NH representatives were present throughout the day and gave input into the production, the actors state that they considered Noren to be their employer. At the end of filming, Conlon wrote the actors' checks on an NH account. Later, Conlon contacted the actors' agents directly and negotiated a buy-out for a radio commercial.

## ACTION

We conclude that NH and Noren were joint employers and are jointly liable for the unlawful failure to apply the SAG contract and the unlawful solicitation of Farmer to withdraw his Union membership. We further conclude that under the

specific facts of this case, asking applicants their union status on the questionnaire was not unlawful.

**A. Joint Employer Status**

Joint employer status exists when two separate entities share or codetermine matters governing essential terms and conditions of employment.[2] A joint employer must meaningfully affect matters relating to employment such as hiring, firing, discipline, supervision and direction.[3] The issue here is whether Noren, which was signatory to the Code, is a joint employer with NH, which clearly employed the actors.[4]

Here, Noren and NH each played an active role in the three main areas of the employment relationship that existed on this project: hiring, directing work, and establishing pay rates and working conditions. First, both parties were involved in the hiring process. Noren's agent, Salamunovich, conducted the first round of interviews. Both Noren and NH together narrowed the list of applicants and selected the three male and female finalists. Given Noren's involvement in these key phases of the hiring process, it is not significant that Noren did not participate in deciding who among those three finalists would receive the job offers. Second, both Noren and NH directed the actors, who testified that they took instruction mainly from Noren with input from NH. Third, both parties set pay rates and working conditions. Within the parameters set by NH, Noren set specific dates for costuming and shooting and determined the flow of production during the shoot. While NH determined the initial offers and authorized increases, Noren communicated the offers to the actors. Finally, the actors viewed Noren as their employer. Given these factors, we conclude that the parties were clearly joint employers of the actors.

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[2] M.B. Sturgis, Inc., 331 NLRB 1298, 1301 (2000); Laerco Transportation, 269 NLRB 324, 325 (1984) (citing Boire v. Greyhound Corp., 376 U.S. 473 (1964) and NLRB v. Browning-Ferris Industries, 691 F.2d 1117, 1121 (3d Cir. 1982)).

[3] Browning-Ferris Industries, 691 F.2d at 1123; Laerco Transportation, 269 NLRB at 325.

[4] The Region has found that the actors were employees of NH and not independent contractors.

**B. Liability of NH for Noren's Alleged Unfair Labor Practices.**

Joint employers are generally liable for the unfair labor practices committed by the other employer.[5] In Capitol EMI Music,[6] however, the Board held that it would not impute liability to a nonacting joint employer where the employer had no involvement in the daily direction of employees and where the alleged violation rests on proof of anti-union motive. In these situations, a nonacting joint employer would be liable for the discriminatory conduct of the other employer only if the nonacting party knew or should have known of the other's unlawful actions and acquiesced to it.[7] The Board reasoned that where joint employers merely supplied employees to a coemployer, the joint employers were not "in a position that would allow them to learn, even with the expenditure of reasonable efforts, of their coemployer's unilateral unlawful actions."[8]

In Capitol EMI, the Board stressed that its holding was a narrow one, applying only to cases in which a joint employer supplied employees to another and was not involved in the daily direction of work.[9] The Board noted that if "one joint employer, by its unlawful conduct, might reasonably be regarded as acting in the 'interest' of its coemployer by chilling the union activity of the employees," the Board might "preclude a seemingly 'innocent' joint employer from reaping the 'benefits' of its coemployer's wrongful conduct by holding the 'innocent' joint employer vicariously liable."[10] The Board reasoned that this outcome was particularly reasonable in more traditional joint employer relationships, where each employer is in a position to investigate and remedy unlawful actions.[11]

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[5] See, e.g., Whitewood Maintenance Co., 292 NLRB 1159, 1162 (1989), enfd. 928 F.2d 1426 (5th Cir. 1991).

[6] 311 NLRB 997, 1000 (1993), enfd. 23 F.3d 399 (4th Cir. 1994).

[7] Id. at 1000.

[8] Ibid.

[9] Id. at 1001.

[10] Id. at 999.

[11] Ibid.

Applying the applicable law to these facts, we conclude that NH is liable with Noren for failing to apply the SAG contract and for soliciting Farmer to withdraw his Union membership. We further find that under the unique circumstances of this case, neither employer acted unlawfully by asking applicants about their union status.

**1. Refusal to apply SAG contract.**

NH is jointly and severally liable for Noren's refusal to apply the SAG contract to this project. The Board has not extended Capitol EMI's analysis to Section 8(a)(5) cases[12] and continues to hold joint employers jointly and severally liable in refusal to bargain cases.[13] Since we have determined that NH was a joint employer with Noren, and this is an 8(a)(5) and (1) allegation not implicating motivation, NH is jointly and severally liable for failing to apply the SAG contract to the shoot.

Even under the Capitol EMI analysis, NH would still be liable for failing to apply the contract. Conlon knew that Noren was a Union signatory and that if the Employers hired SAG talent, they would have to apply the SAG Code. Despite such knowledge, Conlon did not apply the SAG Code.[14] Thus, because Conlon knew that Noren was a signatory when she contracted with it, she should have known of the obligation to apply the SAG Code.[15]

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[12] See Sterling Nursing Home, 316 NLRB 413, 417 n.4 (1995) (ALJ noted that Capitol EMI "applies only to motivation-type violations").

[13] See Branch International, 327 NLRB 209, 219 (1998) (joint employer became bound by collective-bargaining agreement between joint employer's alter ego and union).

[14] Conlon also had information putting her on notice of the issues surrounding Farmer's union status. See infra.

[15] The concerns raised in M.B. Sturgis regarding when it is appropriate to apply a collective-bargaining agreement to a nonsignatory are not implicated here because all unit employees are jointly employed. Thus, this is not a case where a joint employer supplied employees to an entity that already had unit employees who were not jointly employed. See M.B. Sturgis, 331 NLRB at 1306.

**2. Solicitation of Farmer to withdraw Union membership.**

We find that NH is jointly and severally liable for Noren's unlawful solicitation of Farmer to withdraw his Union membership. The Capitol EMI analysis is not applicable here because NH was not an "innocent" employer.[16] Rather, Noren, through its unlawful conduct, was acting in the "interest" of NH, to avoid forcing NH to pay the actors more money as a Union shoot would require or to go back to the client to authorize a Union shoot.[17] Thus, unlike an innocent supplier of employees, NH benefited by having the project remain nonunion. The Capitol EMI analysis is also inapplicable because Noren and NH acted jointly throughout this project, and NH was involved in the daily direction of work. Thus, NH was not merely a supplier or nonactive employer, but rather participated in all aspects of the employment relationship.[18]

Even if the Capitol-EMI analysis were applicable here, NH is still liable for the unlawful solicitation of Farmer to withdraw his Union membership. While Conlon did not know that Noren, through Leahy and Salamunovich, had solicited Farmer's resignation, Conlon knew that Farmer was a SAG member and that he had offered to resign his membership. Given this information, Conlon should have inquired further

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[16] See Capitol EMI, 311 NLRB at 999.

[17] See id.

[18] While the Board recently applied the Capitol EMI analysis to a more traditional joint employer situation, the Board did not clearly extend the test to all joint employer cases. See Le Rendezvous Restaurant, 332 NLRB 336, 337 (2000). In Le Rendezvous, a predecessor employer that sold its hotel restaurant to a successor employer was found to be a joint employer with the successor partly because it was actively involved in hiring and discipline. The Board in Le Rendezvous noted that while Capitol EMI differed from Le Rendezvous in that Le Rendezvous was not a supplier case, the Board concluded without further explanation that "the test for joint liability applies equally as well" to its facts. Id. at 337. Because the Board indicated that Capitol EMI applied under the facts of that case and not in all joint employer cases, it may have applied Capitol EMI because a successorship situation is more like a supplier situation than a traditional joint employer situation. In any case, the Board did not hold that the Capitol EMI analysis would henceforth apply to all joint employer cases.

as to the circumstances surrounding Farmer's offer to withdraw his membership.[19] Instead, she authorized more money for Farmer without inquiring why he was requesting more money, and essentially ratified Leahy's unlawful conduct. Significantly, despite learning of Farmer's Union status, Conlon did not suggest that the shoot go Union. Given her knowledge of Farmer's Union status and NH's involvement throughout all stages of the employment relationship, NH should have known of Noren's unlawful actions. Thus, even applying the Capitol-EMI test, NH is liable for Noren's unlawful conduct.

**3. Questioning applicants as to union status.**

Neither party should be held liable for interrogating the actors as to their union status. While the Board has generally found interrogating applicants about union sentiments in the hiring process to be unlawful,[20] the Board has also held that an interrogation is only unlawful when it is coercive in light of the surrounding circumstances and when no valid justification is offered for the interrogation.[21] In Contractor Services,[22] for instance, the Board held that an employment agency employer acted

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[19] See Action Multicraft, 337 NLRB No. 39, slip op. at 3 (2001) (joint employer had sufficient information to impose duty to inquire why discriminatees were no longer employed).

[20] See M.J. Mechanical Services, 324 NLRB 812, 816 (1997) (questioning applicant about union preferences in job interview is coercive); United L-N Glass, Inc., 297 NLRB 329, 329 n.1 (1989) (same; employer also expressed opposition to union).

[21] See Oil Capital Electric, 337 NLRB No. 150, slip op. at 4 (2002) (questioning applicant about father's union membership was not coercive where it represented "little more than idle curiosity" and where nothing in follow-up question suggested that applicant would be coerced); Rossmore House, 269 NLRB 1176, 1177 (1984) (conversation with open union supporter lawful), affd. *sub nom.* HERE Local 11 v. NLRB, 760 NLRB 1006 (9th Cir. 1985); Cotton Sportswear Mfg., 182 NLRB 825, 846 (1970) (application requiring disclosure of union affiliation unlawful, absent justification); Blue Flash Express, 109 NLRB 591, 593-94 (1954) (lawful questioning whether employees signed authorization cards where employer made clear its need to respond to union recognition request and gave assurances against reprisals).

[22] 324 NLRB 1254, 1254-55 (1994).

unlawfully by questioning job applicants about their union status and then requiring the applicants and their union to sign a guarantee not to leave their jobs because of their union membership. On the other hand, in Bay Control Services,[23] the Board held that it was not coercive to ask a union applicant if she was willing to cross a threatening picket line in light of the safety issues. The Board reasoned that the employer was merely asking if the picket line posed an acceptable risk level to the applicant.[24]

We conclude that here, in light of the surrounding circumstances and the justification for asking employees about their union status, the questionnaire was not coercive. The Employers had a valid justification for needing to know the applicants' union status, since that determined whether the Employers had to apply the SAG contract and how payments to the actors would be structured.[25] Thus, unlike the typical case where an employer is interrogating employees to curtail Section 7 rights, the Employers here had to know the applicants' union status in order to act consistently with their Section 7 collective bargaining rights. While the Employers could have asked these questions later in the hiring process, this fact does not obviate the justification for asking the questions, nor does it render the questionnaire more coercive. Further, because employers in this industry have a justification for requiring applicants to provide their union status, employees are accustomed to providing this information and are unlikely to find the questions coercive. Indeed, actors normally place such information directly on their resumes.

Finally, the questionnaire here was not phrased in a manner that would cause an applicant to feel coerced. If anything, the questionnaire appeared to view union membership positively. Thus, unlike in Contractor Services, where the questionnaire asked union members to abandon their Section 7 right to engage in a work stoppage,[26] the questionnaire here asked if the applicant was willing and eligible to work union. Given the questionnaire's justification, the industry, and the wording of the questionnaire, applicants would not reasonably believe that

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[23] 315 NLRB 30, 42 (1997).

[24] Id.

[25] Cf. M.J. Mechanical, 324 NLRB at 816 (employer's concern about "salting" activity was not a legitimate reason for interrogating applicant).

[26] See 324 NLRB at 1254.

union membership would be viewed negatively or that the Employers were hostile to unions. Thus, under the specific facts of this case, we find that the questionnaire was not coercive.

In sum, absent settlement, complaint should issue alleging that Noren and NH were joint employers and that both are liable for failing to apply the collective bargaining agreement and for soliciting a Union member to withdraw his membership. The Region should, absent withdrawal, dismiss the interrogation allegation.

B.J.K.